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IN THE

Supreme Court of The United States

October Term, 1966

No. 512

NELSON NOEL,

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

J. FREDERICK HOFFMAN,
921 Lafayette Life Building,
Lafayette, Indiana,

THOMAS W. MUNGER,
409-11 Robertson Building,
Lafayette, Indiana,

Attorneys for Petitioner.

Central Publishing Company, Inc., Indianapolis, Ind.

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IN THE

Supreme Court of The United States

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No. ———

NELSON NOEL,

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Nelson Noel, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above entitled cause on April 14, 1966.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Indiana is not yet officially reported, but appears in the National Reporter system at 215 NE 2d 539. A copy of that opinion as there

reported unofficially is set forth in Appendix A hereto at page 1.

Petitioner's request for a re-hearing was denied without opinion. No opinions were rendered by the trial court.

JURISDICTION

The judgment of the Supreme Court of Indiana affirming the judgment of the trial court was entered on April 14, 1966, and a copy thereof is set forth in Appendix B hereto at page 9. The petition for re-hearing in said cause was filed on May 2, 1966, and was denied on June 6, 1966. The order on such denial appears in Appendix C at page 10. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED

The question presented, expressed in the terms and circumstances of the case, may be stated as follows:

> Was the defendant denied due process of law and a fair trial by the Court's refusal to order the Prosecuting Attorney to produce for the defendant's use in the cross-examination of the prosecuting witness a signed statement then in the prosecutor's possession which had been made by such witness to police officers at the time of their arrest of the defendant, request for such order having been made after the witness on cross-examination admitted the making and custody of such statement, where the statement sought was in fact contradictory of the witness' trial testimony, and prior to such request a showing had been made that the witness was on parole from the girls' reformatory

of Indiana which parole could be revoked at any time at the pleasure of officers of said State?

CONSTITUTIONAL PROVISIONS INVOLVED

Section One (1) of The Fourteenth Amendment to the Constitution of the United States and the Sixth Amendment to said Constitution are involved in this appeal, and read respectively as follows:

AMENDMENT 14

Sec. 1. Citizenship—Due process of law—Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 6

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

Petitioner operated a mobile auto supply business, covering his routes in southern Indiana in a 1951 Chevrolet school bus converted into a rolling store. While in Greene County, more than one hundred miles from his home, he was arrested and charged with the offense of enticing a female into said bus, which was alleged to be a house of prostitution, for, as stated in the affidavit, "vicious and immoral purposes, to-wit: for the purpose of having sexual intercourse with said girl and for the purpose of causing, aiding and encouraging said girl to prostitute herself."

At the trial the State of Indiana presented as the prosecuting witness the seventeen year old girl named in the affidavit filed against petitioner. Her testimony was essential to sustaining the charge against him, the gravamen of which was her entry into the bus as a result of petitioner's "enticement".

On direct examination she testified that petitioner and one Dyer had asked her if she wanted a job as a "night worker" and she said she did not, which closed the subject of employment as far as she and petitioner were concerned. She also testified as to other matters designed to support the charge.

On cross-examination this witness admitted that she had been committed to the Indiana Girls' School (i.e. the girls' reformatory) by the present trial court, and that she was then on parole from such reform school. She further admitted that she would remain on parole until she was twenty years old, and could be returned to such reform school at any time. She further admitted having been jailed by the County Sheriff for being drunk, and that while she was so confined she broke out windows and did

damage to the jail. (Such arrest would have been grounds for her return to the reformatory had the officials so wished.) She also admitted that immediately following such jail episode she was told by her parole officer to get a job and that she laughingly told her that she had had an offer of work. The parole officer told her that the police would get in touch with her and lay plans to trap petitioner, which they did. She further admitted that she might have said (sic.—to petitioner's counsel) that anything was better than going back to the girls' school, and therefore she agreed to help the police entrap the petitioner. She conceded that she did "cooperate" with the police as instructed, and participated in carrying out their plans to "catch" the petitioner. She was present with the police as they lay in waiting for him and entered the bus at their request in order to give them an excuse to place petitioner under arrest.

The prosecuting witness further admitted on cross-examination that immediately after petitioner's arrest, and while she, too, was in the custody of the police, she gave to the arresting officers a signed statement relative to the case, which statement was in the prosecutor's hands. She further admitted that immediately after the giving of such statement (which incriminated petitioner) she was told while still at the county jail, "Now you don't owe the County anything", reference being to the damage she had previously done there. Her testimony on cross-examination appears in the Transcript at page 87, line 13 to page 113, line 16.

After establishing the making and present existence of the witness' written statement, the petitioner moved for its production for use in his cross-examination of such witness. This request was summarily overruled by the trial

court without inspection of such writing and before any objection to the request had been made by the prosecutor, the following colloquy taking place (Tr. p. 107, ll. 1—69):

By Mr. Thomas W. Munger, counsel for petitioner:

"Your Honor, please, I would like to have the statement for cross examination of this witness."

By the Court: "Overruled".

By Mr. Thomas W. Munger: "Exception. Your Honor, I feel it is important to me to have the statement to cross examine this witness if he (sic. the prosecutor) has it in Court."

By the Court: "If you want a few minutes to go over your notes, we will be glad to give it to you."

No request had been made by petitioner's counsel for time to go over notes.

Petitioner again sought to obtain the prosecuting witness' statement, the following record being made, and again the Court ruled without any objection having been raised by the prosecutor (Tr. p. 111, ll. l. 22—28):

By Mr. Thomas W. Munger: "I wish to file a motion on behalf of the defendant." (Sic., for the production of the written statement of the witness.)

By the Court: "You may make this record: At this time the defendant files motion to request the prosecuting attorney to produce written statement of Alice Joan Adams, made about August 5."

By the Court: "Motion overruled."

Petitioner was never permitted to see such statement and was obliged to conclude his cross-examination of the prose-

cuting witness without being able to use it to expose her contradictory statements to the jury.

The actual contents of the requested statement came to light, insofar as petitioner is concerned, only when it found its way into the transcript on appeal as a part of the presentence report filed in the trial court proceedings. This statement appears in the transcript at page 58, line 19 to page 59, line 20 and is set forth in Appendix D at page 11. It is patently contradictory of the prosecuting witness' trial testimony (and the testimony of other witnesses as well), a fact obviously known to the prosecuting attorney. It shows clearly that in no manner did the witness enter the bus as a result of enticement or encouragement on the part of petitioner, but solely in compliance with directions from or through her parole or probation officer in order to give the police an excuse to arrest petitioner. It also shows that conversations ascribed to petitioner were actually those of Stella Mae Dyer, and that the petitioner did not make such statements.

The prosecuting witness' testimony that "We were supposed to be checked for any kind of a disease and Nelson was supposed to try us out" (Tr. p. 85, ll. 15—17) was intended to sustain a violation of Section 10-4210, Burns Indiana Statutes, under which such charge was brought, whether the vehicle was or was not found by the jury to be a "house of prostitution" as referred to in said statute. Such testimony was significantly absent from the statement sought by petitioner, and it cannot be told from the verdict which facts were found by the jury. The statute under which the charge was brought is set forth in Appendix E at page 13.

The jury found the defendant guilty of the charge.

The petitioner filed a motion for a new trial which appears in the transcript at page 72, line 5 to page 75, line 23. Specification 3 of said motion raised in the trial court the question as to whether the defendant had been deprived of a fair trial, such specification reading as follows:

> "*3.* Irregularity in the proceeding and Orders of the Court by which the defendant was prevented from having a fair trial in this, that the Court erred in overruling defendant's motion, made during the trial of said cause, to require the State of Indiana to make available to defendant the written statement obtained by the State of Indiana from Alice Joan Adams, made on or about the 5th day of August, 1964, so that same could be used in the cross examination of Alice Joan Adams, maker of such statement, who testified as a witness in this cause."

The entire motion for a new trial was overruled (Tr. p. 75, ll. 24—27), and all specifications were carried forward to the Supreme Court of Indiana by virtue of petitioner's Assignment of Error appearing in the Transcript at page X and reading as follows:

> "1. The Court erred in overruling appellant's motion for a new trial."

The question was presented in the Supreme Court of Indiana under specification 3 of petitioner's motion for a new trial (supra), being set forth in petitioner's brief therein as follows:

> "In denying appellant the right to inspect and use on cross-examination of complaining witness a written statement made by such witness containing matter material to defendant's defense and in conflict with witness' testimony at trial, the

> trial court abused its discretion and thereby deprived appellant of a fair and impartial trial and of his constitutional right to meet the witness face to face."

The Supreme Court of Indiana in its opinion at set forth in Appendix A at page 1, denied that petitioner's constitutional rights were involved and quoted from the case of Anderson v. State, (1959) 239 Ind. 372, 375, 156 N. E. 2d 384, 385, as follows:

> "We do not question the right of the United States Supreme Court to establish rules of practice and procedure for the federal courts. However, we are neither responsible for nor bound by such rules. We are only responsible for and bound by the rules of practice and procedure as established in the State of Indiana, and so long as they guarantee to every citizen his constitutional rights and no federal question is involved . . .
>
> • • • • •
>
> "The adoption of such a rule would constitute a serious departure from the rules of judicial procedure which have, for centuries, protected both the interests of society and the rights of the individual members who may have defied its law."

The court's opinion dealt with the case as though it involved wholesale pre-trial discovery, literally a fishing expedition, which it obviously found to be a distasteful practice. However, petitioner's request was limited to the production of one specific, material, clearly identified and admittedly existent written statement of a vital witness whose testimony in chief had been completed, nothing more, and in no manner did it invoke pre-trial discovery procedures or ethics.

REASONS FOR GRANTING THE WRIT

In holding that the trial court's refusal to order the prosecutor to turn over to the defendant for use in cross examination of the prosecuting witness a signed statement previously made by such witness did not deprive the defendant of a fair trial or deny him the right to confront the witness against him, the state court below decided a federal question of substance in a way probably not in accord with the Fourteenth Amendment to the Constitution of the United States, and probably not in accord with applicable decisions of this Court. Petitioner contends that the trial court's action, as affirmed by the court below, deprived him of his liberty without a fair trial and without due process of law in violation of the provisions of the Fourteenth Amendment in the following respects:

(1) The denial of his request for the witness' previous statement for use in cross-examination deprived him of the right to confront the witness against him;

(2) The denial of his request for the witness' previous statement was, in view of the circumstances of the case, such an abuse of judicial discretion as to deprive petitioner of a fair trial.

The guarantee of the Sixth Amendment providing

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *"

is, by the Fourteenth Amendment made applicable to the states, and thus inures to the protection of a defendant in a state court. *Pointer v. State of Texas,* 380 U. S. 400, 13 L Ed. 2d 923, 85 S. Ct. 1065 (1965). The right of "confrontation" so assured by such guarantee, as established in

that case, includes the right of cross-examination, the Court saying at page 404 of its opinion:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right to confront witnesses against him."

And the right of cross-examination is so fundamental to a fair trial that this Court wrote therein, at page 405:

> "Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."

If the right of confrontation as guaranteed by the Fourteenth Amendment is to be meaningful, if it is to enjoy constitutional stature, it must accord to the accused the right to adequate, full and complete cross-examination in every area in which it may be effective. Half measures will not suffice. This means that the cross-examination to which the accused is rightfully entitled must be sufficiently broad not only to permit him to expose the bias, interest and motivations of the witness, but also to show that such witness has said, or has done, on other occasions, things inconsistent with his statements on the stand, or that his present testimony differs from a previous statement made by him. See *Jencks v. United States,* 353 U. S. 657, 1 L Ed. 2d 1103, 77 S. Ct. 1007 (1957). Any departure from such standard would nullify this constitutional guarantee in the accused's favor. Thus the court may make no order denying, nor may it deny an order making, full utilization of the right to adequate and effective cross examination available to the accused.

Implicit in the accused's constitutional guarantee of the right to adequate cross-examination is his right to have

necessary material for such purpose made available to him, subject only, perhaps, to the limitation that it be competent, relevant and outside of any exclusionary rule. See *Jencks v. United States, supra.* Without such right to obtain and use the material essential to proper and effective cross-examination, the basic right of "confrontation" would, indeed, be hollow, for an accused might lose his life or his liberty because of inability to gain access to a writing which would effectively establish his innocence, even though such writing was in the courtroom during the entire trial.

Although in the present case the means of effective cross-examination of the prosecuting witness, that is, her prior contradictory statement, was in the courtroom in the hands of the county prosecutor, an elected official of the State of Indiana and an officer of the court, the trial court refused to allow petitioner access to such statement. Had such statement been made available to petitioner he would have been able to show the witness' prior contradictory statements, and would have been able to show entrapment engineered and carried out by officers of the trial court. Petitioner urges that this action of the trial court in refusing to allow him to have the witness' statement for use in his defense, deprived him of his right to cross-examine adequately the witness against him, and that such denial deprived him of a fair trial and of his constitutional right to confront such witness.

Petitioner urges that the instant case is also in conflict with this Court's decisions in *Gordon v. United States,* 344 U. S. 414, 97 L Ed. 447, 73 S. Ct. 369, (1953), and *Jencks v. United States,* 353 U. S. 657, 1 L Ed. 2d 1103, 77 S. Ct. 1007, (1957). The Gordon case, though involving proceedings in a federal court, is strikingly similar to petitioner's case, in

that the witness relied on by the prosecution was awaiting sentence in another court, and had been told, in effect, that if he expected leniency he would do well to accommodate the government with complete information, even though it involved others, and that such witness had made several prior statements which differed from his trial testimony. In reversing because of the trial court's refusal to make such evidence available for the defendant's use in cross-examination, this Court said:

> "We are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross examination, especially in dealing with collateral evidence as to character. * * * But this principal cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe that they prejudiced substantial rights and the judgment must be reversed."

Petitioner submits that the judgment of the court below is contrary to the *rationale* of *Miranda v. State*, — U.S. —, 16 L Ed. 2d 694, 86 S. Ct. 1602 (1966), for the reason that if it is important that an accused be not compelled to make a statement against himself, it is equally important to him that he be not deprived of the right to expose false testimony in any way he can. The effect of the present decision was to deny petitioner such right.

This Court is also urged to consider the need for uniformity in the interpretation of the federal question as to the nature and extent of the accused's fundamental right to cross-examine the witnesses against him. Certainly whether a defendant is denied a fair trial within the due

process clause of the Fourteenth Amendment by virtue of being denied the right to effective cross-examination ought not to turn on whether he is tried in Indiana or in a state following a more enlightened concept of criminal justice. If the right is guaranteed by the Fourteenth Amendment, as clearly it is, it must be available to every defendant in every state, and it may not be emasculated by any state because of what such state conceives to be its own public policy in that area.

As to the second point, petitioner presents a classic case for relief from an arbitrary, capricious and unfair ruling, which deprived him of his right to a fair and impartial trial. The evidence at the trial clearly disclosed that the prosecuting witness was on parole from the girls' reformatory and was accordingly vulnerable to coercion, express or implied, by the police, the probation and parole officers, and the prosecutor. It further showed a plan on the part of certain of these persons to "catch" the petitioner, and their use of the prosecuting witness in such scheme. It showed, too, that the witness may have admitted that she fell in with such scheme because anything was better than being returned to the reform school. The court knew, too, of its own knowledge, the untrustworthiness of one of the other witnesses who had not only been in the reform school but also a patient in the state mental hospital. Under such circumstances and in view of the vital nature of the prosecuting witness' testimony, justice and fairness demanded that the petitioner be given every opportunity through cross-examination to defend against such testimony, including the right to use the witness' prior statement then in the hands of the prosecutor for such purpose. Such right was denied petitioner, and for that reason he has been denied a fair trial. The trial court's action was not

the less arbitrary because the evidence sought was impeaching in character. In *Napue v. Illinois*, 360 U. S. 764, 3 L Ed. 2d 1217, 79 S. Ct. 1173 (1959), this Court said:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely, that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this case, People v. Savvides, 1 NY 2d 554, 557, 154 NYS 2d 885, 887, 136 N. E. 2d 853, 854, 855:
>
> > 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and the duty to correct what he knows to be false and elicit the truth * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.' ".

The federal constitutional question here presented is important to the administration of justice, as it is one which, though arising in different forms and circumstances, is potentially inherent in every criminal case which reaches the trial stage. It is particularly likely to recur in those legion of cases in which one co-defendant turns "state's evidence", and it ought to be answered by this court to

the end that there may be equal justice for all defendants as to the points presented.

It is a monstrous miscarriage of justice that a man may be imprisoned because of his inability to use in his defense a statement that is in court, in the possession of an officer of the court, and which should have been made available to him by the court. Such, indeed, is petitioner's case. It cries for relief by this Court.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue herein and that this cause and the fundamental question which it presents be assumed by this Court.

Respectfully submitted,

J. FREDERICK HOFFMAN,
921 Lafayette Life Building,
Lafayette, Indiana,

THOMAS W. MUNGER,
409-11 Robertson Building,
Lafayette, Indiana,

Attorneys for Petitioner.

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APPENDIX A

OPINION OF THE SUPREME COURT OF INDIANA
NELSON NOEL v. STATE OF INDIANA

No. 30765

APPEAL FROM THE GREENE CIRCUIT COURT
HON. EDWIN B. LONG, JUDGE

ARTERBURN, J.—The defendant-appellant was convicted of enticing a female into an immoral place. The evidence shows that the defendant, 43 years of age, owned a 1951 Chevrolet school bus with a cot or bed therein; that in August, 1964 the prosecuting witness, of the age of 17, was approached by the defendant to engage in prostitution in the bus; that he had arrangements with other girls for the same purpose and that one of them had become pregnant and that he was looking for a replacement.

The evidence further shows that he asked one of the girls for the name of some other girls and he, in his school bus with one of the girls, went to see the prosecuting witness and at the time offered her a job as a prostitute on his bus, giving her the details of her work and the price she was to charge. He asked her also if she knew of any other girls he could get to work for him.

The prosecuting witness at the time was on parole from

the Girls School. We may draw from the evidence that she informed her parole officer of the solicitation and that she shortly thereafter informed the defendant that she would work for him. A specific night was fixed for them to meet the defendant with his bus at Bald Knob for her to perform her work. When the girls met the defendant with his bus at that location, the police were there and arrested the defendant.

Errors complained of in the trial court are first, that the court erred in overruling the motion to quash. The memorandum thereto specified that the indictment was vague and indefinite because of the expression therein "to prostitute herself". We are not impressed with this contention, since common usage of the word "prostitute" involves sexual intercourse, although it may have a less immoral meaning in some rather uncommon usage. Merriam-Webster New International Dictionary (3rd ed. 1961) defines the verb prostitute as follows:

> "1. to offer indiscriminately for sexual intercourse esp. for payment....
>
> "2. to devote to corrupt or unworthy purposes or ends...."

The context in which the words in the indictment is used reveals clearly, and in our opinion, definitely its meaning. The indictment reads in part that the defendant did entice the prosecuting witness, a female person, "for vicious and immoral purposes, to-wit: for the purpose of having sexual intercourse with said girl and for the purpose of causing, aiding and encouraging said girl to prostitute herself, . . ." The affidavit clearly states in direct and unmistakable terms the nature and character of the charge against the defendant with certainty to a common intent.

Kraft v. State (1930), 202 Ind. 44, 171 N. E. 1;

Smith v. State (1927), 199 Ind. 217, 156 N. E. 513.

It is next complained that the court erred in excluding the juvenile court record of the prosecuting witness. We find no error in such ruling of the court, since Burns' Ind. Stat. Anno. §9-3215 (1965 Supp.) provides that no child shall "be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, . . ." Burns' Ind. Stat. Anno. §9-3114 (1956 Repl.) further provides that "Such records shall be open only by order of the court to persons having a legitimate interest. . . ."

The purpose of the statute is to protect juveniles against such proceedings brought for their benefit, and it may not be used for the purposes of impeachment.

Woodley v. State (1949), 227 Ind. 407, 86 N. E. 2d 529.

Next, error is complained of in the giving of instruction number 9 by the court. This instruction reads as follows:

> "While it is necessary that every essential element of the crime charged against the accused should be proved by the evidence beyond a reasonable doubt, this does not mean that all the incidental or subsiduary [sic] facts should be proved beyond a reasonable doubt. Evidence is not to be considered in fragmentary parts, and as though each fact or circumstance stood apart from the others, but the entire evidence is to be considered. The weight of the testimony to be determined from the other evidence may be weak, if not *impossible*, but when viewed in connection with surrounding facts and circumstances, it may be so well supported as to remove all doubts as to its existence, as detailed by the witness. Acts when considered apart from all other evidence may appear innocent, but

when considered with other evidence may import guilt." (Our italics)

The defendant's objection to this instruction was that the sentence beginning with the words ". . . The weight" and ending with the word "witness" is without meaning and confusing. It appears to us that what has happened through some typographical error is that the word "impossible" has been used instead of the word "improbable", but we do not feel that such a slight irregularity creates any confusion, to the prejudice of either of the parties in this cause. The trial judge in substance told the jury that they should not become engrossed with minor points, but should view the evidence as a whole. It is unrealistic to impose upon a court absolute perfection in the use of language or grammar. Instructing a jury is most difficult and complex, without indulging in super-refinements which have no substantial effect upon the ordinary and common meaning to be drawn from the instruction. Words at the best are imperfect means of precise communication. Their meaning will vary with the time, the place or the environment under which they are uttered. We do not believe the average layman or juryman could have been misled by this instruction. The instruction as a whole is one which an ordinary person can understand.

Wilkoff v. State (1923), 260 Ind. 142, 185 N. E. 642;

Males v. State (1927), 199 Ind. 196, 156 N. E. 403.

The appellant further contends that the court committed error in this case in refusing to give his tendered instruction number 13. This instruction told the jury that if they found that the prosecuting witness was committed to the Indiana Girls School, even though she was on parole, the

defendant could not be convicted under Burns' Ind. Stat. Anno. §10-4210 (1956 Repl.), the act under which he was charged. The court did not err in refusing to give this instruction, since it was mandatory in form and for the reason that Burns' Ind. Stat. Anno. §10-4210 (1956 Repl.) under which the criminal charge was brought, is broader in scope than Burns' Ind. Stat. Anno. §10-4215 (1956 Repl.) The latter statute makes unlawful the solicitation of girls committed to the Indiana Girls School for prostitution in "a house or lodging place" and like structures. On the other hand, Burns' Ind. Stat. Anno. §10-4210 (1956 Repl.) includes not only houses and like structures but also "any other place for vicious or immoral purposes; . . ."

There is some contention made that the bus in this case was not "a house of prostitution." However, the memorandum to quash the affidavit does not specify or raise such point therein. The affidavit does specifically allege a "1951 Chevrolet bus" as the place. No alleged error was therefore saved on such contention for review on appeal.

It is finally urged that the court erred in refusing to order the state to produce an alleged written statement made by the prosecuting witness, which was taken by a deputy sheriff. It is argued that this was necessary to properly cross-examine the prosecuting witness and show inconsistencies in her statement. The case of *Jencks v. United States* (1957), 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 is cited for authority on this point. It is argued that this is a constitutional right. In *Rosenberg v. United States* (1958), 358 U. S. 904, 79 S. Ct. 233, 3 L. Ed. 2d 227 the court limited argument to two questions, one of which was whether the *Jencks* case involved a rule of mere procedure or constitutional rights. In its opinion in that case no constitutional question is considered.

In *Palermo v. United States* (1959), 360 U. S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287, the theory that the *Jencks* case was grounded on a constitutional right was rejected. Justice Frankfurter, speaking for the court, stated at page 345:

> "Exercising our power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts, this Court, on June 3, 1957, in Jencks v. United States, 353 U. S. 657, decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses."

It therefore appears that the right to demand from the prosecution that a written statement of a witness be produced is a matter only of procedural law in the Federal courts and not one of a constitutional right.

Whether we in this state should adopt a procedural rule that would permit a party in a criminal case to secure the production of written statements made by a witness in the files of the opposing party is a question which has many doubtful aspects. It is, of course, true that we are searching for the truth in any criminal case. However, there are balancing factors which must be taken into consideration in the operation of such a rule. If the defendant is entitled to the production of papers in the files of the state, then it seems to us that there would be logic in the same rule applying to any witness which the defendant may produce. This rule would not apply to a defendant himself unless he took the stand and waived his constitutional immunity against self-incrimination. In such event the state then would have the right to ask that his personal file be opened

for the inspection of any letters or written statements made by the defendant in order to use such papers against him in cross-examination in bringing out the truth. At the same time the question would arise: Would the state, as well as the defendant, be entitled to know all the witnesses that each party expects to produce prior to trial? Along with this would arise the question of whether or not the grand jury investigation ought to be opened for inspection of the defendant as well as the state. These are all factors, among many more, which would have to be resolved in event any such rule were to be seriously considered as part of the criminal procedure in this state.

We are not unaware also in connection with this matter that complaint has been made in Federal court proceedings that the diligent, industrious lawyer who prepares his case ahead of time, can be compelled to open his files for the inspection and use of counsel on the other side who have not been diligent in investigation, in securing witnesses and testimony. With all these factors to be considered, this Court said in *Anderson v. State* (1959), 239 Ind. 372, 375, 156 N. E. 2d 384, 385:

> "We do not question the right of the United States Supreme Court to establish rules of practice and procedure for the federal courts. However, we are neither responsible for nor bound by such rules. We are only responsible for and bound by the rules of practice and procedure as established in the State of Indiana, and so long as they guarantee to every citizen his constitutional rights and no federal question is involved. . . .
>
> * * * * * *
>
> "The adoption of such a rule would constitute a serious departure from the rules of judicial procedure which have, for centuries, protected both the interests

> of society and the rights of the individual members who may have defied its law."

It is finally contended that the evidence is insufficient to sustain the verdict for the reason that it fails to show that the prosecuting witness was solicited or enticed, particularly on the night the police made the arrest of the appellant in his school bus at Bald Knob. With this contention we cannot agree because an original solicitation was made some time prior thereto when the appellant paid a visit to the prosecuting witness at her home and the original proposition was made to her. A rejection at the time does not erase the criminal intent of the appellant to solicit, encourage or entice a girl to a place of prostitution. On the night in question he requested the girls to get into the bus. In the respect above mentioned, the case of *LaMar v. State* (1953), 231 Ind. 508, 109 N. E. 2d 614 is not in point, because in that case the girl herself made the solicitation for work as a prostitute. Neither is there any basis for the contention that the appellant was entrapped in this case, since the initial idea as to his activity in using a bus as a place of prostitution originated with him and the evidence shows he had been engaged in such activity sometime prior thereto.

> "The criminal intent originated in appellant's own mind and his conduct in execution thereof was not inspired or induced by the boy or the police." *Ditton v. State* (1943), 222 Ind. 25, 26, 51 N. E. 2d 356.

We find no error presented and the judgment of the trial court is affirmed.

MYERS, C. J. and RAKESTRAW, J. concur.

JACKSON, J. concurs in result only.

ACHOR, J. not participating.

APPENDIX B

JUDGMENT

1965 April 14 23 Judicial Day. November Term, 1965 Judgment affirmed. Arterburn, J. Myers, C. J. and Rakestraw, J. concur. Jackson, J. concurs in result only. Achor, J. not participating.

APPENDIX C

ORDER ON DENIAL OF REHEARING

1966 June 6 Appellant's petition for rehearing denied. Jackson, J. votes to grant rehearing. Achor, J. not participating. Rakestraw, C. J.

APPENDIX D

STATEMENT OF ALICE JOAN ADAMS

"On or about the 20th day of July, 1964, Stella Dyer and Nelson Noel came to my house in a bus, gray & black in color. Stella asked me if I would like to have job dancing and I said no. Nelson asked me if I would like to work in the bus as a night worker and I said no. I told them that I did not care that much for money. Stella said she felt the same way when she got out of girl's school. I asked Nelson why he came to see me and he said because Stella knew me and he couldn't walk up to strange girls and ask them if they wanted to go out and do a little fucking. I then told them that I had to go and they asked if I knew of anyone else they could get and I sent them to see Ruby Thompson. I mentioned this to my parole officer who in turn contacted Ruth Owens the probation officer. In the mean time Gloria Abrell and I saw Stella at the Triangle restaurant in Worthington and I told her that I had changed my mind and that Gloria and I wanted some easy money. We did this because we thought this might keep some girl from getting in trouble. Stella explained the operation to us and told us how much we would get. She said that we would get seven dollars for a straight fuck, ten dollars for a half & half and fourteen dollars for a blow job. She also told us how to tell if the men had any disease. She said if it was running to leave the man alone. Stella told us that Nelson kept rubbers by the bed and also a bottle of listerine, this was to be used on a man before a blow job. At this meeting we made a date to meet them at Bald Knob on Wednesday night the 29th. The next morning I contacted Mrs. Owens and told her the story and

that we would go through with it if she would have the police there to catch the guy. On Wednesday morning the 29th, Nelson and Stella came to my house in a Volkswagen and told me that the plans had been changed because the bus had broken down, and for me to meet them the next Wednesday at 6:00 P.M. at Bald Knob, and that Gloria was to be there also. At this meeting there was some talk about his having a gun in the bus. On August 5, 1964 we met Stella and Nelson at Bald Knob and just as we got on the bus the State Police and Sheriff's Department arrested them."

APPENDIX E

SEC. 10-4210 BURNS INDIANA STATUTES ANNO.

Enticing female into immoral places.—It shall be unlawful for any male person over the age of seventeen (17) years, to cause, encourage or entice, any female person, other than his wife, under the age of eighteen (18) years, to enter or to accompany any such person into a house of prostitution, assignation, saloon or wine-room where intoxicating liquors are sold, or any other place for vicious or immoral purposes; and any person so offending shall be guilty of a felony and shall be tried for such offense in any court of competent jurisdiction, and upon conviction thereof shall be imprisoned in the state prison not less than two (2) years, and not more than fourteen (14) years; and the fact that such a man shall have entered with such a woman any house of prostitution, assignation, saloon or wine-room where intoxicating liquors are sold shall constitute prima facie evidence of criminal intent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 512

NELSON NOEL,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. DILLON
Attorney General of Indiana
DOUGLAS B. MCFADDEN
Deputy Attorney General
Attorneys for Respondent

Office of Attorney General
219 State House
Indianapolis, Indiana

C. E. Pauley & Co., Inc., Indianapolis

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QUESTION PRESENTED

Respondent restates the question presented, as follows:

1. Whether the state trial court's denial of defendant's motion for production of a signed statement of a witness for the state, in possession of the prosecutor, for inspection and use in the cross-examination of such witness violated the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent sets forth the following statute in addition to those set forth in the Petition:

18 U.S.C. § 3500:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> "(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which does not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such

statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT OF CASE

Petitioner, Nelson Noel, was convicted of enticing a female into an immoral place and sentenced to two to fourteen years in the Indiana State Prison on December 2, 1964. The State's evidence was as follows:

Noel first contacted a girl named Stella Mae Dyer, age nineteen, the first part of July, 1964, at her house. He asked her at that time if she wanted a job as a waitress at Kay's Truck Stop, a restaurant in Plainville, Indiana. (Tr. 153). The girl said that she did and went with Noel to the restaurant in a school bus, painted black, which the latter was driving. Enroute to the restaurant they stopped and had sexual intercourse on a bed in the rear of the bus. (Tr. 154-155). The girl further testified that after arriving at the restaurant, Noel "talked to some guys about me that I was good stuff and all that and that is where it started in the prostitution deal." (Tr. 155).

She testified that Noel "told me the price to take from the men" and that "he had already talked to the person I was supposed to have intercourse with and told him what the price was." (Tr. 156). The price was to be $7.00 per man. (Tr. 156).

On that occasion the girl, Stella Mae Dyer, had intercourse with seven or eight different men in Noel's converted school bus and all paid her. (Tr. 157). Out of the money received she gave the woman at the restaurant $1.00 for each man and gave the remaining sum to Noel who gave some of it back to her. (Tr. 158).

Stella Mae Dyer accompanied Noel to the restaurant on another occasion and indulged in the same activities. (Tr. 159).

Upon becoming pregnant, she decided to quit prostitution. (Tr. 160). Noel asked her for the names of other girls, and she gave him the names Virginia Rose, Joan Adams, and Ruby Thompson. (Tr. 161).

Noel, accompanied by Stella Mae Dyer, in the school bus, went to see Alice Joan Adams at her home sometime in July, 1964. (Tr. 79). Noel offered the girl a job as a prostitute on his bus. (Tr. 80 and Tr. 161). Noel told her the charge was $7.00 per man and that she could make $60.00 per night. Joan Adams was only seventeen years old at the time, of which Noel was aware. (Tr. 162). Noel also asked her if she knew of any other girls for such work. Joan Adams said she did and sent them to another girl's home. (Tr. 81).

Subsequent to this meeting, Joan Adams agreed to help the police apprehend Noel. (Tr. 96).

Arrangements were made between Noel and the two girls, Joan Adams and Gloria Ann Abrell, the latter being twenty years of age, to meet Noel at a place called Bald Knob on the night of August 5, 1964, to work as prostitutes for the night in Noel's converted school bus. (Tr. 81). The plans had been changed to the night of August 5 because Noel's bus had broken down on the previous night scheduled for the operation. According to the plan, after arriving at Bald Knob, Noel would have intercourse with the two girls to "try them out" and check them for disease. (Tr. 85). After this, Noel planned to take them to Kay's Truck Stop to indulge in prostitution in the bus. (Tr. 165).

On the evening of August 5, 1964, Joan Adams and Gloria Abrell met Noel and Stella Mae Dyer at Bald Knob. The two girls parked the car they were driving and boarded

Noel's converted bus. (Tr. 86 and Tr. 166). Thereupon the police came out of the corn field, where they had been hiding, and placed Noel under arrest. (Tr. 87 and Tr. 142).

On the day of the arrest Joan Adams gave the police a signed statement which petitioner claims to be inconsistent with her testimony at the trial. (See Appendix D to Petition). During the cross-examination of Joan Adams, counsel for Noel moved for production of the statement. The motion was denied. (Tr. 107). The jury found Noel guilty. His conviction was thereafter affirmed by the Supreme Court of Indiana.

ARGUMENT

I.

THE OVERRULING OF PETITIONER'S MOTION TO PRODUCE A WRITTEN STATEMENT GIVEN BY A WITNESS FOR THE PROSECUTION TO THE POLICE FOR PETITIONER'S USE IN CROSS-EXAMINING SUCH WITNESS DID NOT VIOLATE THE CONFRONTATION CLAUSE.

During the cross-examination of Joan Adams, counsel for petitioner moved for production of a statement given by her to the police shortly after Noel's arrest. The trial court properly overruled the motion. Petitioner asserts that such a denial of production violates the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

The thrust of petitioner's argument is that *Jencks v. United States,* 353 U.S. 657 (1947), has constitutional underpinnings. Such a contention must be rejected in light of this Court's activity in the production area of the law.

This Court in the *Jencks* case held "that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." 353 U.S. 672. The defendant in that case was prosecuted under 18 U.S.C. § 1001 for falsely swearing by affidavit that he was not a member of the Communist Party. The crucial testimony against him was given by two paid undercover agents for the F.B.I.,

who stated on cross-examination that they had made regular oral or written reports to the F.B.I. on the matters about which they had testified. The trial court denied the defendant's motion for production of the reports for inspection by the court for possible use in impeaching their testimony. The Constitution is nowhere mentioned in this Court's opinion in that case.

In granting certiorari in *Rosenberg v. United States,* 358 U.S. 904 (1958), this Court limited argument to two questions one of which was whether *Jencks v. United States, supra,* involved a rule of mere procedure or one of constitutional rights. In the decision on the merits however, *Rosenberg v. United States,* 360 U.S. 367 (1959), no mention was made of the constitutional question. The case was decided on the basis of the Jencks Act, 18 U.S.C. § 3500, and not the Constitution. Mr. Justice Frankfurter, speaking for the Court, said:

> ". . . We have today held in *Palermo v. United States, ante,* p. 343, that since its enactment 18 U.S.C. (Supp. V) § 3500 and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." 360 U.S. 369.

The Jencks Act, 18 U.S.C. § 3500 was enacted by Congress subsequent to this Court's decision in *Jencks v. United States, supra.*

This Court did, in essence, in *Palermo v. United States,* 360 U.S. 343 (1959), reject the theory that the *Jencks* case was grounded in constitutional law when it said:

> "Exercising our power, in the absence of statutory provision, to prescribe procedures for the adminis-

> tration of justice in the federal courts, this Court, on June 3, 1957, in *Jencks v. United States,* 353 U.S. 657, decided that the defense in a federal criminal prosecution was entitled under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses." 343 U.S. 345.

It is clear that the *Jencks* rule merely involved a rule of discovery propounded by this Court acting in its supervisory capacity over federal criminal prosecutions. Such rules of production and inspection did not have their growth in the common law, but grew out of the bill of discovery in equity. As pointed out by Mr. Justice Cardozo in *People ex rel. Lemon v. Supreme Court,* 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (1927), modern discovery statutes borrowed from this equitable device. There is neither an historical or constitutional basis for the *Jencks* rule. It is not embodied in the Confrontation Clause of the Sixth Amendment. The right to confront one's accusers and witnesses does not include the right to search the State's files for evidence to attack the credibility of the State's witnesses.

The question of discovery in criminal cases is one that must be resolved in the legislative chambers as Congress did in enacting Section 3500.

Pointer v. Texas, 380 U.S. 400 (1965) is clearly distinguishable from the case at bar. There the accused was denied cross-examination of his accuser where the evidence consisted of a transcript of the witness's testimony at the preliminary hearing. Here the accused, by counsel, did cross-examine the State's witnesses. Whether his cross-examination of Joan Adams would have been more effective

with her prior statement is a matter of conjecture and trial strategy analysis. It does not, however, amount to a denial of confrontation by one's accusers.

CONCLUSION

Petitioner has failed to present a question of sufficient merit under Rule 19 of this Court to warrant review of the decision of the Indiana court.

WHEREFORE, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana

DOUGLAS B. MCFADDEN
Deputy Attorney General

Attorneys for Respondent

Office of Attorney General
219 State House
Indianapolis, Indiana